

PERSPECTIVES ON THE ROLE OF INSTRUCTIONAL VIDEO IN HIGHER EDUCATION

Evolving Pedagogy, Copyright
Challenges, and Support Models

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Dramatic changes in higher education are being fueled by innovation in media and technology. Providing access to instructional media resources is a messy, expensive, complex business, so it is essential to understand why this effort is worth taking up in the first place. It should be acknowledged that there is a rich history of local institutional, instructor-, and student-generated video used for instructional purposes (e.g., interviews, performances, documenting behavior, lab experiments, simulations, surgical procedures, etc.). As I will describe in the final section, these two types of content are frequently interwoven into teaching and learning contexts and offer some exciting directions for the future of media support.

At the most basic level, instructional video communicates information through aural and moving image modes, often supported by storytelling narrative, which would be difficult to effectively express through text or speech alone. In general, the subject content of a video is of primary consideration to instructors when selecting material. Otto (2014) found in a survey of 250 Rutgers faculty members that title selection varies significantly according to discipline and topic. For example, cinema studies instructors, the most frequent users of video according to the survey, utilize feature films to illustrate various elements related to the historical and cultural significance of film and filmmaking. With the exception of communication studies (a discipline that makes greater use of news and television programming), Otto reported that humanities and social science instructors prefer “documentaries, fictional films, and “locally produced video from YouTube and similar sites,” whereas sciences faculty

members reported a preference for “research video and footage documenting a process or activity” (Otto 2014: 124).

These findings are not surprising. Many informative documentary programs can help students understand complex topics in ways that connect cognitive and affective learning. For example, *Race: The Power of an Illusion*, a popular documentary series by Herbes-Sommers, Strain, and Smith (2003), is a powerful program that makes use of archival media and interviews, blended with explanation of science in a storytelling narrative, to help students across multiple disciplines (e.g., from addiction studies to sociology on my campus) interrogate their deeply held assumptions on race in history and society by demonstrating the fallacy of biological human differences.

Instructional video use extends beyond documentary and feature film genres. For example, social work and psychology students explore various approaches to psychotherapy treatment through videos of clinical case studies (e.g., the groundbreaking *Three Approaches to Psychotherapy* series, aka “Gloria Films” by Everett Shostrom (1965)). Language students watch foreign films and educational language videos to improve their proficiency and gain a greater appreciation for the cultures native to their chosen language of study. In biology and other sciences, students watch streaming video abstract clips embedded in research articles from the *Journal of Visualized Experiments* database to learn about specific lab processes and experiment results.

As a hybrid media librarian and learning technologist, I am interested in better understanding not only the value of the specific titles we offer our instructors to help them illustrate key concepts but also how elements such as video format, clip length, technical quality, and streaming platform functionality impacts instruction and can be leveraged to encourage innovative pedagogical practices.

For example, it is understandable that a cinema studies instructor may prefer a 16mm film or DVD/VHS video due to the inherent higher resolution of some physical formats, differing film versions released on specific formats, and disciplinary appreciation for the physical media itself. Further, some instructors may prefer the relative ease at which a DVD/VHS/Blu-ray segment can be cued using a classroom VCR/DVD player, perhaps mixed in concert with digital video clips and lecture slides on their computer, in a lecture style akin to a DJ. Also, in some higher education contexts, instructors may battle with issues of poor-quality classroom bandwidth whereby a physical medium may be preferable. Nevertheless, instructors and students have increasingly expressed a preference for digital streaming access, evidenced on our campus by an increase in licensed streaming adoption and a decrease in the number of advanced booking requests for physical media, further supported by Otto’s survey that found streaming to be the most preferred video delivery format (Otto 2014: 130).

The streaming video format can offer some unique affordances over physical media that include and go beyond convenience. For example, instructor Steve Cardamone teaches a Shakespeare theater course. In his course, students are required to view streaming video of BBC professional performances from a variety of Shakespeare plays outside of class to prepare for their in-class performances. The University of Minnesota Libraries (Libraries) licenses online access to this content through the Ambrose Digital Video Streaming database. In terms of subject content, Mr. Cardamone suggested that he considered these videos to be primary course materials, “You can’t equate reading a Shakespeare play to seeing and hearing it: it aides in clarity, relationship understanding, and is simply more interesting” (Cardamone, personal communication July 19, 2012). Before they were aware of the streaming access, Cardamone’s students would come to the library to check out legacy, often degraded-quality VHS versions. For the students, being able to access this online collection is not only more convenient but

also affords an opportunity to more easily preview a wide range of performances. Also, by offering streaming access through the Alexander Street Press Theatre in Video database to another title used in the class, *Playing Shakespeare*, a documentary television series that teaches Shakespeare performance technique by Royal Shakespeare Company actors, by John Barton (1979), the Libraries have helped Cardamone facilitate a “flipped” classroom model, whereby students are able to view the material outside of class and instead utilize class time for discussion and performance.

Instructors recognize the important affordances of audiovisual instructional materials as they advance the learning process. University of Minnesota School of Nursing instructional designer Nima Salehi echoes Cardamone’s sentiment on the value of instructional video, in terms of both subject content and audiovisual modality, in supporting the development of applied skill sets within the contexts of course instruction, practicums, and professional exam preparation. Salehi also notes the benefits that the streaming format affords her program given their significant online presence, suggesting that instructional video offers students understanding and reinforcement of concepts learned in text and graphic course materials; the ability to prepare for and study practicum procedures that are then reinforced by follow-up text self-assessments; and the opportunity to review and reinforce clinical practicum procedures visually. In an interview, Salehi continues:

In particular access to digital video brings to life many of the professional and interpersonal interactions between nurses, colleagues and patients. This significantly enhances instruction provided through text and graphic materials. Digital video has enhanced Nursing instruction for online and in class courses and practicums immeasurably. Since many of the digital video materials are housed by the library, this provides students with an opportunity for ongoing review as they prepare for critical Nursing state exams and certification. The visual component is vital as it provides a much richer and in depth experience than simple text or graphic content.

(Salehi, personal communication October 30, 2012)

The ability to offer campus-wide streaming access provides additional benefits that span disciplines, notably the ability for a large number of students to consume this material at the place and time of their choosing. This capacity is more than a matter of simple convenience. For example, our institution licenses the aforementioned *Race: The Power of an Illusion* through the Kanopy streaming service. It is not uncommon for this and other popular titles to surpass over 150 digital playbacks in a single evening! Even if the library wanted to provide access to this material through DVD course reserves for in-library viewing, we simply do not have enough copies or DVD players to cover this class size. As a result, in the past, instructors would have either been required to screen these titles in-class, reserve a space for out-of-class screening, or bypass the use of this material all together. In addition, through a pilot project using text analysis software to scan digitized syllabi for course use of media, I found that sometimes a required response paper accompanies these out-of-class screenings. For this type of assignment, streaming video provides an opportunity for students to have ready access and playback control of the material, which is useful for writing an effective response.

Another compelling rationale for streaming video is that, in addition to traditional face-to-face course use, streaming video also offers an opportunity for instructors to create a more engaging, multimodal learning experience for their students in hybrid and fully online learning environments. With effective online course design, many of the pedagogical teaching and learning affordances of streaming video that apply to the in-person classroom environment

could be applied to these online courses. Though there is a tradition of libraries circulating physical media in support of distance learning courses, as a practical matter given the rapid growth of online classes and the development of robust learning management systems (LMS), it is becoming increasingly critical that media support services are positioned to provide streaming video access.

Finally, the media librarian profession has an ethos to be format agnostic to the extent possible, out of respect for the needs of our instructors, students, and researchers. To best meet these needs, as suggested by Otto (2014), it is important that the media professionals continue to investigate and capture the many rich ways our users are utilizing video in their teaching and research. Through this investigation utilizing methods such as cultivating individual relationships, surveys, syllabi reviews, and professional networking, academic librarians can continue to improve our understanding and perhaps be better positioned to advocate and inspire new possibilities for innovative teaching and research uses of video resources. I believe this rich tradition and the limitless potential for future media resource use are very exciting and most certainly worth fighting for!

Historical Perspectives on Video Access in Higher Education

Though video has become increasingly ubiquitous in our culture and offers teaching and learning opportunities within the academy, a trend that has been projected to continue (Kaufman & Mohan 2009), this digital environment has also created unprecedented challenges due in large part to copyright law and a number of other related concerns.

The complexity of dealing with commercial media collections in higher education is not new (media support is a specialization after all!). From the advent of academic lantern slide collections in the late 19th century to 16mm film, ¾-inch videotape (U-matic), Betamax, ½-inch videotape (VHS), Laserdiscs, DVD, Blu-ray (Widzinski 2010), and more recently streaming video, colleges and universities have been pressed to constantly adapt to changing visual formats and user expectations. The greatest growth of academic library-based media collections and services began in the 1960s continuing through the 1990s (Widzinski 2010: 359). Previously, the responsibility for the management of audiovisual instructional collections and support for class playback equipment was primarily handled by professional “audiovisualists” through film support units administered largely outside the academic library (Luocks-DiMatteo 1985: 81). Widzinski suggests that this growing adoption was spurred by an increase in public investment in higher education and the consumer electronics marketplace, such as the evolution of media formats and related playback technology (Widzinski 2010: 359). During this period, the acquisition of instructional video became so common that by 2002 Brancolini suggested that nearly 100% of academic libraries held video in their collections (Brancolini 2002: 48).

While copyright and fair use have long been important considerations for media support services and our users, the impact on practice has evolved over time, especially in the modern digital era. For example, according to Handman, prior to the mid-1980s with greater adoption of the videocassette format, copyright challenges with respect to media replacement were more limited since it was difficult for most institutions to reproduce 16mm film in-house—a process that was expensive, required specialized equipment, and called for technical expertise (2002: 294–295). Even with the transition to VHS and later DVD formats, it is not clear from the literature the extent to which copyright law was a major obstacle to providing material access. This is not to suggest that there have not been video-related service practices that have relied heavily on fair use or similar developed community practice guidelines. For instance,

many higher education institutions offered (and some continue to offer) off-air recording services, for which non-legally binding limited time access and use Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes (“Kastenmeier guidelines”) (Guidelines for Off-Air Recording 1981) were negotiated between industry rights holders and education representatives. Another common practice intersecting with fair use has been the circulation of instructor-owned VHS/DVD materials placed on course reserves in the library. Differences among academic libraries regarding instructional support for audiovisual materials reflected different interpretations of the guidelines. As an illustrative early example on the differences of institutional fair use risk assessment, some libraries have maintained strict policies of accepting only lawfully produced instructor-owned copies, whereas others will accept instructor-owned material regardless of origination (e.g., off-air recordings and video clip compilations). For example, a film studies instructor may record an off-air broadcast program of the Americanized version of the film *Godzilla* (1954), *Godzilla, King of the Monsters!* by Ishirō Honda and Terry Morse (1956) that perhaps includes some special commentary in support of an assignment whereby their students contrast this film with the original Japanese version. To facilitate a more ideal playback environment, the instructor may decide to place a homemade VHS or DVD copy of the program with the library reserves collection for students to watch outside of class in the library. Among several requirements, including whether the library limits circulation of this material to ten consecutive school days, the material is screened within forty-five days of the recording, and the material is no longer retained thereafter; this service could be in violation of the Kastenmeier guidelines, which, as noted, are not legally binding. Given the legal ambiguity, this practice has some level of associated institutional risk.

Further, libraries have long dealt with fair use issues relating to public performance rights (PPR), particularly within the context of screening films in noncurricular contexts such as campus groups or events (Handman 2002: 288–291). This is not necessarily an issue related to campus media services, since, as I will further discuss, many libraries do not actively purchase PPR, but an issue arises because they often hold the proposed event title within their collections and employ media professionals that provide users with fair use guidance.

Finally, another ongoing fair use concern relates to the library’s role in video preservation. As Clark notes, given the fragility of VHS materials (an estimated ten to twenty-five years before the magnetic media begins to degrade (“Special Problems for Video Tapes,” n.d.), in addition to format obsolescence concerns as a result of playback equipment no longer being available, libraries are sometimes required to consider the possibility of format migration (Clark 2002: 225, 231, 236–237). This issue is particularly acute with respect to irreplaceable Video At Risk VHS materials.

The mid-1980s began what the media librarian community sometimes refers to as the Home Video Era. Spurred by the availability of the affordable videocassette format, in addition to playback and recording equipment technology, King posits that it was the landmark Supreme Court decision *Sony Corp. of America v. Universal City Studios, Inc.* (1984), which legally allowed for home recording of television programs for time-shifting purposes, that served as a catalyst for library-based video collections to flourish (King 2014). Per King, ironically, in the educational context it was not this newly recognized consumer right to record off-air programming (of which the noted Kastenmeier guidelines provided some negotiated limited use agreement for educational use) but the entertainment industry’s response to begin distributing their films at a reasonable price and through commercial retail channels in order to capture some revenue out of fear that consumers would amass large home video libraries of television programs and feature films (King 2014: 297–298). Because libraries are able to loan materials

without rights holder permission under the first sale doctrine 17 U.S.C. §109, this marketplace movement had the effect of significantly increasing the number of television and film programs available for purchase while also relaxing the tight control that at least the entertainment industry had previously held through distribution channels and use terms.

The distribution of video material is only one of several copyright considerations in higher education teaching, learning, and research contexts that sometimes serve as barriers to access and use. In this section, I will ---provide more detailed examples in a few additional notable areas where copyright and fair use considerations intersect with user needs. Specifically, I will cover face-to-face and online course contexts; preservation of at-risk physical media materials (e.g., VHS tapes); accessibility (e.g., captioning); and the emergence of born digital content (content distributed online only in digital format, such as from an independent film producer website or web television programs that are restricted to individual subscribers on consumer-based streaming services, such as Netflix). I should note that several additional potential instructional video use cases face copyright challenges, as the full range of fair use provisions may not be available or may be more limited in a given academic instance. Notable examples include video use in massive open online courses (MOOCs), participation in inter-library loan (ILL) programs (Bergman 2010), non-course-related campus screenings (PPR), video use in for-profit higher education institutions, fair use rights applied to materials that may not have been lawfully produced or acquired (e.g., ephemera works), and reuse of video in so-called multimodal scholarship (fair use applied to repurposing commercial video through traditional and alternative publication channels and formats). I will touch on some of these areas in the final section.

Fair Use Classroom Viewing

Distribution and reproduction are two of the five exclusive nonaudio material-related rights granted to copyright holders under 17 U.S.C. §106 of the Copyright Act of 1976 (1976), the others being the creation of derivative works, public performance, and display. As Handman notes, because 17 U.S.C. §106 provides an exclusive right for content producers to control the public performance of their works, 17 U.S.C. §110(1) is critically important because this provision provides for the use of copyrighted material in “face-to-face” teaching or “similar places devoted to instruction” without the requirement to gain rights holder permission or to purchase expensive PPR licenses (Handman 2002: 288).

Given that the law does not typically require licenses for in-class screenings of film or video, libraries will often forego this purchase if the same title can be purchased without PPR through a mass retail outlet such as Amazon.com. Moreover, few feature film releases offer PPR directly with DVD purchases, which typically require paying an additional fee through a licensing agent. However, a variety of independent film and educational video producers who specialize in content geared toward niche markets and who thus have much lower sales volumes to recoup their high production costs use a tiered pricing model for home-use, public library, K-12 and higher education, with the latter almost always requiring PPR purchase as a condition of material acquisition (often at a much higher institutional rate!). This requirement places considerable stress on the academic library as librarians strive to provide users with access to requested content, whenever reasonably possible. Though I appreciate the critical role and value that this content affords our users and recognize the need for film producers to recoup their costs while making a living, this business model has long been contentious and ultimately unsustainable, as a result of shrinking library collections’ budgets.

Digitization and Streaming for Online Viewing

Since copyright law is designed to provide content creators with limited exclusive rights to control the distribution, access, use, and performance of their works, balanced against noninfringing fair use rights by individuals, it is not surprising that disagreements between rights holders and users have become more complicated with the emergence of a digital environment that makes the reproduction, distribution, display, public performance, and derivative creation easier. Moreover, since fair use is a legal defense against a copyright infringement lawsuit decided on a case-by-case basis, absent clearly defined legal exemptions such as 17 U.S.C. §110(1), fair use is purposefully (and thankfully!) ambiguous, providing much needed flexibility. Within the context of streaming instructional video under fair use in higher education, much of the debate essentially boils down to what amount of the material, under what circumstances, and with what access restrictions can a film or video be digitally captured, stored, streamed, and accessed without permission?

Disagreement on the application of fair use for educational multimedia has persisted since the 1990s with a number of reports, guidelines, codes of best practices, and legal remedies since created to address this gap—solutions that in some cases have led to greater confusion than clarity. Case in point: the *Fair Use Guidelines for Educational Multimedia*, a nonlegislative report negotiated between rights holders and educators as a result of the Conference on Fair Use (CONFU), detailed specific limitations on the use of commercial film and video content for teaching and research purposes (i.e., 3 minutes or 10% of the work, whichever is less) (Educational Multimedia Fair Use Guidelines 1996). These guidelines, which were led in development by the Consortium of Colleges and University Media Centers (CCUMC), was sunsetted in 2012, when the organization instead adopted the more broadly defined Association of Research Libraries (ARL) Code of Best Practices in Fair Use for Academic and Research Libraries (Adler et al. 2012). The adoption of the Code was an acknowledgment by CCUMC that strictly defined limitations on instructional video access and use run counter to the flexible spirit of fair use, rights that are necessary for meeting the diverse needs of our teaching, learning, and research communities.

Though rights holders and educators generally agree that at least some limited clip making digitization and streaming are permissible under fair use (provided the video was lawfully made and legally acquired by a nonprofit institution, limited to students enrolled in the course, and accessed through a secured website), the amount of the video digitized is often a point of contention. To illustrate, in contrast to the articulated limited portions in the Fair Use Guidelines, Band and colleagues (2010) and Russell (2010) have proposed fair use application arguments that they contend could be legally defensible for the digitization and streaming of up to an entire work in limited circumstances. In this section, I will describe two of their provisional arguments in more detail (the primary fair use exemption (17 U.S.C. §107) and the Technology, Education, and Copyright Harmonization (TEACH) Act (17 U.S.C. §110(2)) (2002) and briefly mention a third (U.S.C. §110(1)). I will also address some of the additional challenges created by the Digital Millennium Copyright Act (DMCA) of 1998 (17 U.S.C. §1201) (1998).

Fair Use Rationale for Digitization and Streaming

In their brief prepared for the Library Copyright Alliance, *Streaming of Films for Educational Purposes*, Band and colleagues (2010) propose that perhaps the strongest educational argument for digitizing and streaming up to an entire video lies in the primary fair use copyright provision 17 U.S.C. §107. They suggest that courts are likely to favor the copying, performance

and display of video in nonprofit educational contexts, especially where the purpose of the video use differs from the intended audience of its creation, such as feature films that were made for entertainment purposes. When making a fair use analysis, the authors note the importance of balancing the use purpose, with the three additional fair use factors: nature of the work, amount used, and effect of use on the market (Band et al. 2010: 2). In referencing case law where entire digitized works were ruled to be fair use, the authors propose that a fair use argument could be further strengthened not only by physically “transforming” the work through alteration, such as compressing the video to lower the quality or, even while maintaining the original high quality, by repurposing or recontextualizing the work in a meaningful way. For example, they submit that a repurposing argument could be made if an assignment required the viewing of the entire feature film for the purposes of close analysis (Band et al. 2010: 2). Close analysis is a common pedagogical use practice in several disciplines such as film, media, and gender studies where the work’s format and structure are analyzed in addition to an examination of the work’s content and presentation of ideas. The authors also argue that a fair use rationale for digitizing up to an entire work could be further strengthened if the use of the video is recontextualized, for example where a digitized film is embedded on a secured course website and accompanied with related study materials and interactive features (e.g., additional materials, study questions, annotations, commentary, student feedback, etc.) (Band et al. 2010: 3). Further, Russell notes that the 17 U.S.C. §107 fair use provision of copyright law is applicable in digital environments (Russell 2010: 354). In addition, Russell cites the congressional record (Report of the Senate Committee on the Judiciary on the Technology, Education, and Copyright Harmonization Act of 2001, S. Rep. No. 107–31 (2001)) during the development of TEACH, suggesting that lawmakers made clear that the “limited portions” language in TEACH should not limit the right of an individual to also assert a 17 U.S.C. §107 fair use claim in certain circumstances, for example in the case of a distance education course if a greater portion of a feature film were required (Russell 2010: 354).

The TEACH Act and 17 U.S.C. §110(1) Digitization and Streaming Rationale

In addition to the primary fair use provision 17 U.S.C. §107, Band et al. (2010) suggest that TEACH 17 U.S.C. §110(2) could be cited as rationale to potentially digitize and stream up to an entire work in limited cases. TEACH is a complex statute that was designed to extend the fair use rights articulated in 17 U.S.C. §110(1) to the online environment with certain limits. Per Band et al., these limitations include the following:

1. The transmission must be a lawfully made and acquired copy.
2. The performance must be of “reasonable and limited portions” of works such as films.
3. The performance is made by, at the direction of, or under the actual of supervision of an instructor as an “integral part of a class session.”
4. The transmitting institution applies technological measures that reasonably prevent the retention of the work by recipients for longer than the class session and unauthorized dissemination by recipients to others (Band et al. 2010: 5).

In describing a scenario where TEACH may allow for the digitization and streaming of up to an entire work, they note the first requirement is likely to be filled as institutions typically use lawfully made and acquired content. In addition, per the fourth requirement,

streaming software and campus LMS course sites typically have the ability to prevent retention and unauthorized distribution. To meet the second requirement, the authors note that even though the statute specifies that “limited portions” of a film can be created, since the purpose of TEACH was to provide an online learning experience that is “analogous to the type of performance or display that would take place in a live classroom setting” (S. Rep. No. 107–31 (2001)) and in some cases the screening of an entire film may be required, a court may rule that this use case fits the definition of “reasonable and limited portion.” Finally, they submit that, for the third requirement, a court may rule that it is permissible to digitize up to an entire work if, for example, instead of requiring students to attend an out-of-class screening session in a scheduled classroom (covered under 17 U.S.C. §110(1)), they viewed the entirety of a film remotely instead. Further, the authors suggest that according to the *Report of the Senate Committee on the Judiciary on the Technology, Education, and Copyright Harmonization Act* (S. Rep. No. 107–31 (2001)), the intent of the language requiring an instructor to be “supervising” the performance of a work was not meant to be literal but rather to distinguish the use of materials that could be used in the classroom from course materials designed to be used individually, such as textbooks (Band et al. 2010: 6).

To date, there is limited case law that specifically addresses the practice of digitizing and streaming commercial copyrighted video under a fair use rationale for course use. The most applicable case is the *Association for Information Media and Equipment and Ambrose Video Publishing Inc. v. The Regents of the University of California et al.* (2010) (*AIME v UCLA*). While AIME brought the case on behalf of their membership, the co-plaintiff Ambrose Video Publishing, specifically represented their own content (the aforementioned BBC Shakespeare series). This case focused on whether a UCLA instructional support service (Media Lab) infringed on the rights of copyright holders and were in breach of contract when, without rights holders permission, they digitized DVDs from their collection and hosted up to full-length video content on a campus streaming server in order to provide more convenient course-based access to instructors and students. UCLA claimed this practice was permissible under principles of fair use and the TEACH Act, while AIME and Ambrose Video Publishing contended this service was a violation of copyright law and a breach of contract.

U.S. District Court Judge Consuelo Marshall twice dismissed the plaintiffs’ complaints, ruling in favor of UCLA on non-copyright-related grounds. In her judgment, Judge Marshall ruled that since AIME did not own any copyrights of the material in question, the group was not legally positioned to assert sufficient “standing” to represent the copy rights on behalf of the rights holders. Further, the language in the contract UCLA signed with the coplaintiff, Ambrose Video Publishing, allowed for the public display of the material in question and did not specifically prohibit the digitization and streaming practice of the Media Lab. Therefore, UCLA was not in breach of contract. Finally, Judge Marshall ruled that AIME could not sue UCLA because the institution was covered under the legal doctrine of sovereign immunity, which essentially means that the state (in this case UCLA and the individuals working on its behalf) cannot be sued in federal court without first waiving their right to immunity.

Though the dismissal of this case on non-copyright-related grounds meant that there were no decisive fair use rulings to serve as precedent for future litigation, as Smith notes, Judge Marshall did provide some thoughtful fair use analysis of the four factors in her decision (Smith 2012) that in my opinion supports many of the arguments posited by Band et al. (2010) and Russell (2010) for digitizing and streaming up to an entire work in limited circumstances. In looking at the four factors, per Smith, Judge Marshall’s analysis suggested that the educational use purpose of this material favored UCLA; that the creative nature of the Shakespeare plays was offset by the educational context of its use, favoring neither side; that the full-length

digitization and streaming of this material “slightly” favored Ambrose (though she found merit in UCLA’s “time-shifting” argument that digitization and streaming practice is comparable to the video recording fair use supported by *Sony Corp. of America v. Universal City Studios, Inc.*); and, finally, that in terms of the fourth factor (impact on market), this use favors UCLA given that in her opinion, there is no more market harm for accessing a streaming title than if the students were all viewing the video together in a classroom, which is clearly permissible under the law. Indeed, as Judge Marshall wrote in her ruling, “the type of access that students and/or faculty may have, whether overseas or at a coffee shop, does not take the viewing of the DVD out of the educational context.” That said, as Smith critically notes, absent the vaguely written contract language written from Ambrose, it is quite possible that the fair use and sovereign immunity arguments may not hold up in future cases (Smith 2012). Therefore, it is important that institutions be mindful of the contract terms they are signing.

Digital Millennium Copyright Act (DMCA)

Even where fair use exemptions provide a strong fair use defense for an institution to legally digitize and stream commercial film or video, the Digital Millennium Copyright Act (DMCA) of 1998 (17 U.S.C. §1201(1998)) can act as a potential barrier to content access. The DMCA was enacted to comply with the World Intellectual Property Organization (WIPO) Copyright Treaty. This amendment makes it illegal to circumvent technology protection measures (TPM) (e.g., the content scrambling system (CSS) often found on DVDs) in order to access the video content required for streaming. To balance these restrictions with noninfringing fair uses, the Librarian of Congress holds triennial rulemaking proceedings that have led to the expansion of some limited exemptions for circumventing TPM. Unfortunately, these exemptions are applicable for only three years and can be rescinded at the next proceeding, making this remedy less than ideal. As of the most recent 2015 DMCA rulemaking (“Section 1201 Exemptions” n.d.), the Librarian of Congress has again ruled that screen capture software is a noncircumventing tool and can be used to create “short portions” of video clips from lawfully produced and acquired DVDs, Blu-rays, and streaming video for the purposes of instruction in nonprofit educational environments (this exemption also now applies to nonprofit MOOC environments with additional limitations). Further, whereas a screen capture of video creates a video file of inferior technical quality, the current DMCA exemptions continue to allow for the use of “ripping” software in order to create short portions of higher-quality video files directly from physical and streaming media sources in higher education courses for use in commentary or criticism (e.g., the “close analysis” of a film, where reduced quality may not suffice). The “short portion” language of the DMCA exemptions is generally interpreted to exclude the digitization and streaming of an entire work. As in the case of the general fair use provision 17 U.S.C. §107 and TEACH, depending on how one interprets this limitation, it often serves as a significant obstacle to providing streaming access of up to an entire work even where the instructional use case may be warranted and possibly justified under other fair use exemptions.

As illustrated, there is a great amount of variance in fair use interpretation applied to instructional video between rights holders, librarians, legislators, copyright experts and even jurists. Given this diversity of opinion, it is no surprise that faculty members often do not have a good understanding of fair use (Otto 2014: 133). As a result, it is important that these constituencies collaborate to help educate one another and develop flexible shared understandings at both the institutional and professional levels, aided perhaps, by documents such as Code of Best Practices for Fair Use developed by American University in collaboration with individuals and organizations representing various communities of practice.

Though fair use provisions offer some additional rights, as earlier noted per Smith and further suggested by Band et al. (2010) and Russell (2010), agreed-upon contract terms as a condition of instructional video purchase that restrict distribution and access supersede these rights. Therefore, it is important to carefully read vendor contracts and to negotiate more favorable terms or be prepared to decline purchase if necessary. In addition, it is important to understand that not all video genres necessarily are granted the same fair use protections. To illustrate, in contrast to the 17 U.S.C. §110(1) classroom use exemption, TEACH specifically exempts “a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.” Though other fair use exemptions may be applicable (e.g., 17 U.S.C. §107), TEACH may not be a good rationale, for example, in the case of digitizing and streaming VHS or DVD content of the type of nursing educational video material earlier referenced, as this content is typically produced for and marketed primarily toward nursing education programs.

Video At Risk

Given the complexities of the entertainment and educational media industries and marketplace, there are times when a title may not be available for purchase in new condition, at a reasonable cost, and in a format that is not obsolete (unlike film and arguably VHS). For example, this situation may arise because:

- Some of the most popular television programs and film documentaries used for instructional purposes were not produced specifically for the education market (e.g., certain PBS programs) and may never have been made available for sale or released in DVD or streaming video formats.
- Given the limited marketplace for specialized independent film/educational media content, it may not make economic sense for the rights holder to pay the considerable expense to reformat VHS content to DVD or streaming video.
- Sometimes an initial royalty contract between a film producer and the rights holders of content used within a film (e.g., music, footage) is such that the terms of agreement failed to negotiate compensation for future formats (e.g., the DVD version of *Eyes on the Prize*, a documentary produced by Judith Vecchione and Jon Else (1987–1990) was delayed for several years for this reason).
- Sometimes foreign films do not have a North American distributor, and/or the film producer prohibits the resale of their work outside specified regions.
- Sometimes rights holders refuse to license their works in new formats, such as streaming video, due to concerns over piracy or the potential for lost sales.
- Sometimes the rights to a film are in limbo (e.g., the original rights holder dies), a film production company goes bankrupt, or their back catalog is sold to another production company, with the new rights holder deciding not to release a title in a newer format or deciding to take the title out of distribution.

In these events, sometimes a video will fall into an orphan-like work status commonly referred to as Video At Risk. Acknowledging the cultural stewardship role of libraries, the Copyright Act includes the 17 U.S.C. §108 provisions that provide libraries with the ability to make a limited number of duplicate copies of at-risk materials for the purpose of preserving access. It is important to note that 17 U.S.C. §108 sets the bar fairly high for a library to make this determination before copies can be made. For example, if an item is available for sale in the

marketplace at a reasonable price and not in an obsolete format; than a library is obliged to purchase that copy instead of making a duplicate. It is not clear how 17 U.S.C. §108 defines the concept of format obsolescence, other than “if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”

For VHS materials, this definition is particularly timely, given that the last manufacturer of VCRs ceased production at the end of July 2016 (Pressman 2016). Further, the law requires that libraries take steps and document their efforts in search of a replacement copy and the rights holder before making an at-risk determination. While it is generally agreed that making a duplicate of a video from one physical format to another physical format is legal under 17 U.S.C. §108 (e.g., VHS to DVD), it is less clear if this provision also extends to the conversion of a physical video to streaming, as 17 U.S.C. §108 narrowly limits the viewing of preservation made copies to the “the premises of the library or archives.”

Though I have found that instructors generally prefer more recent content, several VHS titles in my library collections that are still circulated regularly could be classified as Video At Risk. Further, because academic libraries collectively hold tens of thousands of specialized independent film, educational videos, television programs, in some cases rare versions of feature films, and other types of commercial video that were often not originally widely distributed, librarians have a cultural stewardship responsibility to preserve access to this material. Therefore, depending on institutional 17 U.S.C. §108 exemption fair use interpretation and application, this statute may or may not go far enough in preserving access to this valuable VHS content for current and future generations of scholars.

Lastly, as a practical matter, it is becoming increasingly difficult to play back VHS materials in the classroom. According to a 2015 survey of forty-nine classroom A/V professionals from Association of Research Libraries (ARL) institutions responsible for managing classroom video playback equipment, the vast majority of respondents reported that they have either begun or plan to begin the process of phasing out support for VCRs in their campus classrooms within the next three years (Spicer & Horbal 2017). Though most respondents reported that they intend to continue support for classroom DVD playback capacity for the foreseeable future (typically via the installation of DVD-backward-compatible Blu-ray players), given that the top reason provided for the phased retirement of VCRs was lack of device availability in the marketplace, it is likely that a time will come in the not too distant future (perhaps, five to ten years) that playback support for DVD and Blu-ray media will likewise gradually cease to be a standard A/V classroom component. Just as VHS format degradation is a concern, the loss of classroom VHS playback capability has and will continue to be a challenge for campus media support and instructors who rely on these materials for their teaching, especially in the case of irreplaceable Video At Risk materials. As a result, institutions need to develop thoughtful VHS collection management strategies and perhaps consider the application of more progressive fair use interpretation in preserving this access or risk losing this valuable content. (See “Video At Risk: Strategies for Preserving Commercial Video Collections in Libraries” (Besser et al. 2012) for guidelines developed to help institutions make fair use preservation determinations of at risk VHS materials.)

Born Digital Content

An instructional video copyright concern that has emerged over recent years is access to born digital commercial video, which includes, for example, films that are exclusively distributed online and original web television programming produced and distributed through consumer

digital delivery services such as Netflix and Amazon Prime (e.g., *House of Cards* and *Transparent*). Whereas the negotiated Kastenmeier guidelines provided some agreed-upon guidelines to capture off-air television programming for instructional purposes, currently no analogous guidelines offer similar policy direction for capturing born digital programming through consumer channels. Further, because these services do not typically offer an institutional streaming access license (though some libraries have experimented with Netflix subscriptions [Healy 2010]) or distribute this content via DVD where they could be purchased through a retail channel such as Amazon.com, it is not typically possible to fill instructor requests for this material.

As a result, instructors often need to resort to either screening a required born digital video in the physical classroom using their own service account (which may be a violation of contract terms), or they may require their students to set up an account with these services. In addition, because this content is wrapped in digital rights management (DRM) software, the DMCA offers protections that once again serve as obstacles to being able to capture and stream this content under fair use. In response, Cross suggests that libraries consider taking the progressive step to subscribe to these services, and then implement policies that are aligned with the spirit of fair use exemptions, “enabling personal use, avoiding commercial advantage, offering lawfully-made materials, and facilitating uses that are likely to be fair such as teaching, scholarship, research, and especially transformative uses” (Cross 2016: 13).

Specifically, Cross suggests that a library could take a very broad reading of the “personal use” language found in consumer streaming services, as several have in the case of lending iPads that come preloaded with software that often include similar limited individual use terms of service. As I will elaborate further, this movement toward a tightly controlled born digital distribution environment presents a potential considerable harm to instructors and students for the use of this media in scholarship and to some extent a potential long-term existential risk to the campus media services that help facilitate this access.

Video Accessibility (Captioning)

The final copyright challenge that I will discuss relates to instructional video accessibility, in particular captioning. First and foremost, to the utmost extent possible, providing access to course materials to those who are hearing impaired, deaf, visually impaired, and blind is the right and humane thing to do. It is also a legal responsibility of educational institutions required under the Americans with Disabilities Act (ADA) of 1990 42 U.S.C. §12101 (1990). This legal responsibility has taken on greater visibility in light of *National Association of the Deaf (NAD) et al. v. Harvard University, et al.* (2015) and *National Association of the Deaf (NAD) et al., v. Massachusetts Institute of Technology* (2015), a pair of discrimination lawsuits brought against Harvard University and MIT for failing to caption their public MOOC courses and other online video content. These are just two of a growing list of accessibility challenges brought by either lawsuit or the Department of Justice, the agency responsible for monitoring ADA compliance, alleging failure to provide reasonable access to course materials in higher education (Carlson 2016).

Unfortunately, a significant amount of the VHS/DVD video collections and even licensed streaming content in library instructional video collections are not captioned. Further, as Morris notes, the DMCA does not offer an exemption allowing for the circumvention of TPM-protected video for captioning purposes (Morris 2016). I have seen firsthand how this tension between the ADA and DMCA has impeded course use of instructional video. At my institution, copyright barriers have meant that, in several instances, the captioning service unit

in our Disability Resources Center has asked for permission from the rights holder to be able to circumvent TPM to create a digital file in order to provide captioning for a DVD video from our collections. In some cases, where the Libraries did not originally pay for PPR (as noted, not a required purchase for classroom use), the captioning unit has been told that they need to purchase PPR in order to circumvent TPM.

Commercial video producers should not release uncaptioned video to the public. In my opinion, in the event that they do, upon request a rights holder should take responsibility and try to provide a captioned version if possible. Short of that, I believe it is morally questionable to require additional payment so that a hearing impaired or deaf student can access this content, regardless of whether the institution originally purchased the optional PPR.

It is important to understand that instructional video copyright challenges do not exist in a bubble. On the one hand, there are several instructor and institutional pressures pushing for improved instructional video access (in both physical and streaming formats), while simultaneously there are significant non-copyright-related challenges that can sometimes serve as obstacles to implementing the most ideal solutions. Some of this pressure stems from evolved user expectations for streaming access, driven in part by increased use of consumer streaming services and web content but also by the exponential growth of hybrid and fully online e-learning courses, digital environments that necessitate streaming delivery. Though there are many considerations, the primary non-copyright-related challenges to providing improved instructional video access include the costs and expertise required to develop and maintain local technical infrastructure for the digitization and management of local streaming collections, significant costs for licensing streaming video, and relatively limited options and some trepidation by librarians in purchasing expensive streaming licensing for feature films and television programs that are often available for DVD purchase or at a reasonable rental cost via consumer streaming services.

An Overview of Contemporary Digital Video Delivery Access Models in Higher Education

Thus far I have described some of the critical roles and pedagogical benefits that instructional video affords in support of teaching and learning, in addition to some of the copyright and other challenges that can act as barriers to meeting user needs. Of course, the emergence of the online digital environment has significantly altered instructors' reliance on libraries (and similar campus media services) as a primary service point for this content. To illustrate, Otto found that the Rutgers Library was the fourth place instructors reported seeking content, after use of their own personal collections, online sites such as YouTube, and personal/departamental video purchases (Otto 2014: 127–128).

This transition toward streaming access has changed the dynamic between the media librarian, libraries, and instructors (Vallier 2010; King 2014; Widzinski 2010). For example, we have seen an overall decrease in demand for circulating physical media and decreased usage of media centers for screening videos. That said, libraries still perform a critical function in providing access to specialized independent films and educational media, television programs, feature films, and other types of video that instructors and students utilize every day. This shift is a natural evolution in the spirit of historical academic media use and support. Like all such transitions, this period of change comes with its own unique concerns and opportunities. For example, as suggested, streaming video provides instructors with more options to deploy pedagogical approaches appropriate to their courses and preferred teaching styles. For students, streaming video offers greater convenience and in many cases a wider array of direct access

to materials that may not have been previously available. So whereas a single title may have been screened in a class before, that same streaming version of the title today may have a high digital hit count indicative of an out-of-class required viewing. Depending on the pedagogical context, this may or may not provide a better learning experience, but I believe it is overly simplistic to suggest that this change is necessarily good or bad without better understanding the contexts in which they are used.

Acknowledging this evolution, I believe the extent to which libraries are able to balance the capacity to expand access to streaming video, while maintaining quality physical media collections and related media resource support services (e.g., media cataloging, guides, and systems for easily locating and accessing media in library collections, providing title recommendations, etc.), the more relevant and valuable the media service and media support professionals are likely to remain in the future. The development of this quality media programming could be enhanced through adoption of the principles articulated in the American Library Association (ALA) Association of College and Research Libraries (ACRL) Guidelines for Media Resources in Academic Libraries (2012).

To provide greater context for the current state of these practices, in this next section, I will provide some insight into current instructor media use preferences and approaches that libraries are taking to expand streaming access. Unfortunately, there is no easy, inexpensive, unquestionably 100% copyright-compliant silver bullet solution that meets all of our users' instructional video needs. Most institutions rely on some patchwork of streaming delivery approaches implemented to the best of their ability according to their institutional context. According to Farrelly and Hutchison Surdi (2016), who conducted a survey of 260 academic librarians responsible for media collections and representing multiple types of academic libraries, nearly 89% of respondents currently offer a subscription to at least one commercial streaming video database. This response is comparable to their earlier 2013 survey results (Farrelly & Hutchison 2014), suggesting that streaming is a topic that touches virtually every academic library.

Practice: Licensing Streaming Video Content Through Video Producers and Distributors

One of the most common approaches libraries adopt to provide instructional streaming video access is through licensing. Video licensing is available in multiple content selection and pricing configurations. Typically, with the database license model, a campus media support unit (most often the library) pays to license access to a bundle of independent film/educational media distributor–curated collection of videos related to a discipline or topic, for a defined term limit (i.e., one, three, or five years), that are stored and delivered from the distributor's server and accessed through a secure Internet protocol (IP) campus login similar to other library-purchased electronic resources. These products began to appear in the marketplace beginning in the early 2000s, notably from Alexander Street Press and Films for the Humanities, and have continued to experience rapid growth and popularity over the past decade, driven in part by new streaming distributors entering the marketplace, such as Kanopy, Docuseek2, and many others. As Handman notes, there are several benefits of subscribing to curated collections, particularly for institutions with limited staff and smaller collections. Among the disadvantages to subscribing to bundled streaming content is that often these collections are of uneven quality, this model fails to leverage the librarians' expertise in developing a diverse media collection appropriate to their campus needs, and often these collections omit exemplar titles as a result of the distributor being unable to obtain streaming rights from the film producer (Handman 2010: 331).

Per Farrelly and Hutchison Surdi (2016), though licensing of curated streaming video bundles continues to be the primary choice for streaming acquisition, there has also been a significant increase of libraries licensing of individual streaming titles through vendor-hosted services (70% in 2015, up from 29% in 2013). This response is in line with our own experience. For example, at my own institution, a few years ago we conducted an audit of heavily circulated physical media titles and in response made some streaming investments to license the entire California Newsreel and Media Education Foundation video collections hosted on the Kanopy streaming platform. In addition, we have also licensed select individual titles from Kanopy and other vendors as requested on a case-by-case basis. As a result, we have witnessed a considerable decrease in advanced booking requests for the VHS and DVD versions of these titles, while the digital playback usage statistics for many of these titles has been strong.

An alternative to licensing streaming video on vendor-hosted platforms is purchasing the digital site license (DSL) rights to stream a video locally (or through a shared video digitization, hosting, and streaming service such as NJVid, which is sponsored by multiple institutions). For DSL videos, sometimes the distributor will send a video file, but more often the DSL simply provides the right for an institution to digitize, host, and stream a video file ripped from a previously purchased DVD. The advantage of instructional video DSLs is that often (though not always) these licenses grant perpetual rights to access streaming, whereas vendor-hosted licensed content is typically term limited. The DSL is also a good solution for obtaining streaming access to one-off videos that may not be distributed through vendor-hosted streaming channels and is therefore often purchased directly from the film producer. Perhaps, somewhat surprisingly, according to Farrelly and Hutchison's 2015 survey, the purchase of DSL collections (bundles of video stored on a local server) has barely changed since 2013 (43% in 2015 compared to 42% in 2013) and only slightly changed for DSL of single titles (47% in 2015 compared to 44% in 2013) (Farrelly & Hutchison Surdi 2016).

There are several disadvantages to purchasing DSL rights, notably the need to either pay into a shared streaming service or develop local digitization, hosting, and streaming infrastructure using digital media asset management and delivery software such as the open-source Avalon Media System. This solution also requires resident technical expertise for legacy media conversion, cataloging, ongoing media asset management due to changing digital formats, ongoing server maintenance, and on-demand technical support for when user playback issues inevitably arise. Further, this solution requires a significant investment for staffing, conversion equipment, servers, storage space, software licensing, and the cost of the DSL itself (which often ranges from the cost of an independent film/educational video DVD purchase to twice as much or more). Additional disadvantages with locally hosting DSL content includes the resources required to vet, negotiate, and manage streaming contracts from a number of different film distributors or producers that may come with differing terms; these videos often lack captioning (which is also a significant problem for content that has been digitized and streamed under fair use as few titles were reported captioned using local streaming services) (Farrelly & Hutchison Surdi 2016), a functionality that is much more common (though far from ubiquitous) for titles streamed from vendor-hosted platforms; and DSL videos often lack quality cataloging that aid in the discovery of this material through the library catalog. Furthermore, depending on the local streaming video platform software being used, DSL content may lack some of the LMS embed, clip making, and transcript functionality often found in vendor streaming databases. Finally, the licensing terms of the DSL perpetual access is often limited to the "life of the file," a product of the industry practice of negotiating distribution terms according to the format distribution type (i.e., DVD or streaming) by film producers, distributors, and sometimes individuals who have licensed reuse rights to music and visual images used within the video itself. In practice, given constantly changing

digital formats, coupled with bandwidth and device-aware video delivery systems such as Kaltura, it is unrealistic to expect that the exact DSL video file created or received will be the same one that will forever be stored and delivered. This issue is a matter of contract law, not copyright, but demonstrates some of the peculiar challenges that campus media and electronic resources professionals face in trying to expand streaming access through licensing approaches alone.

It should also be noted that only a small percentage of all the commercial video content ever produced is available for institutional licensing on either vendor-hosted platforms or through a DSL. This issue is a challenge not only for procuring digital streaming access to independent films and educational media but for television programs and feature films as well. To date, the only streaming service I am aware of that offers institutional licensing and hosted streaming access is the SWANK Digital Campus database, which contains some of the feature film catalogs from five of the six major studios (excluding Fox). Though this product is a popular solution that has been adopted by several campuses, like most commercial streaming media products, the price for this product is relatively high and requires an ongoing “serial” investment in contrast to a one-time \$20 feature film DVD purchase. Further, whereas specialized independent film and educational media are often sold through a single distribution channel, there is some trepidation on the part of many librarians to invest heavily in streaming versions of feature films that are often readily available for rent at a reasonable cost through consumer streaming services. Finally, as is the case with term-limited vendor-hosted licensed streaming content, once the buyer stops paying the serial fee, access to the streaming video content disappears. As Handman suggests, this licensing shift to a more temporal “just-in-time” collection development strategy undercuts the traditional role of the academic library in “fostering discovery and use of valuable new resources and providing and preserving a range of unique materials not widely available in the information marketplace” (Handman 2010: 325).

As in the case of born digital format type content such as independent films and web television programming distributed online only with restricted user access terms, some educational media products (such as the SAGE Video database) have begun to produce original in-house and/or licensed exclusive online content. In contrast to the born digital film and television web programming, these materials can be purchased only via institutional licensing. I believe that, over the next decade, we will continue to witness this continued shift toward born digital content in both the independent film and educational media industries with extreme divergent institutional licensing options (i.e., either an institutional license is completely unavailable, or institutional licensing is the only way to access this content). Further, as witnessed with academic journal publishers, I believe the educational media born digital marketplace will ultimately become a major impediment in our mission to provide access to the content our instructors and students require for teaching (and research), due in large part to budgetary concerns. Finally, barring some kind of agreement between video rights holders and educators to deposit these works into a “dark storage” repository such as CLOCKSS, a not-for-profit venture between academic publishers and research libraries designed to provide preserved access to web-based scholarly content, I believe there is a strong potential risk for loss of content access over time.

Practice: Digitizing and Streaming Video On-Demand Under a Fair Use Rationale

As noted, no topic is as controversial with respect to instructional video, as the practice of digitization and streaming video on demand under a fair use rationale. Farrelly and Hutchison’s 2013 survey found that 41% of respondents reported offering library-based on-demand

digitization and streaming (Farrelly & Hutchison 2014). For the 2015 follow-up survey, the question was amended to include not only the library but other campus units as well. Perhaps, because of this addition and/or the growing popularity of this practice, the 2015 response had a significant resultant increase, with 53% reporting this practice (Farrelly & Hutchison Surdi 2016). Furthermore, for institutions that have their own local streaming infrastructure, 81% reported offering an on-demand digitization and streaming service! When limited to a comparison of library-based digitization and streaming services, there was also a significant increase from 2013 to 2015 (73% in 2015 compared to 41% in 2013) an increase of 32%! While libraries may purchase a lot of instructional video, Farrelly and Hutchison Surdi's survey found that the library was not the primary reported campus streaming service but rather a campus IT department, e-learning support unit, or other department (Farrelly & Hutchison Surdi 2016).

Where the division of labor is spread across campus support units, fair use interpretation can sometimes differ among those responsible for acquiring and maintaining instructional video collections and those responsible for digitizing, hosting, and delivering streaming video. Therefore, it is important to communicate across units and try to collaboratively develop a shared understanding of fair use institutional application of fair use and the development of a seamless workflow for acquiring content and rights as needed in addition to streaming delivery and related support. (See Carlisle Fountain [2011] for an example of campus streaming collaborative workflow negotiated across the library and an IT unit at Washington State University [Vancouver].)

As noted, several exemptions are specifically carved out in copyright law for fair use of video in nonprofit educational classroom contexts (e.g., 17 U.S.C. §110(1), 17 U.S.C. §110(2), and 17 U.S.C. §1201 (DMCA anticircumvention exemptions), the libraries' role in preserving access to our cultural record (17 U.S.C. §108), and, of course, the general fair use provision 17 U.S.C. §107 that likely allow for some level of digitization, hosting, and streaming of commercial instructional video content without permission. A few of the critical questions each institution needs to consider when thinking about the possibility of developing a digitization service are:

1. To what extent does the institution believe these exemptions allow them to digitize a video (e.g., limited portions of a video or up to an entire work if necessary? Different fair use interpretation for dramatic and nonfiction works?)?
2. What policies and security mechanisms present the best fair use defense, while balancing streaming service workflow and user access needs (e.g., limit the video to a single class (e-reserves model) or providing access to the entire campus? If, for a single class, can the video be made accessible for the entire semester, or does it need to be removed after a brief period of time? When the class is no longer using the video, does the video file need to be deleted from the server, or can it be stored for future use while making it no longer accessible?)?
3. Does the institution have an obligation to always license access to the streaming video if available or only under certain circumstances, such as when an entire work is requested in streaming?
4. What is the institutional fair use assessment for determining Video At Risk (VHS) digitization for preservation and sustained access purposes? Is streaming access acceptable, or is the institution only comfortable with format transfer from VHS to DVD (perhaps with a digital file stored as backup)?
5. What about fair use applied to digitizing and streaming VHS materials that may not technically qualify as at risk (e.g., a DVD may be available for purchase), but in the instance where the campus is no longer supporting classroom VCRs?

Per Farrelly & Hutchison Surdi (2016), for the increasing number of institutions that have been developing some level of on-demand digitization and streaming support services, there is a wide range of fair use interpretations and attendant practices and policies. Given the purposeful ambiguity of copyright law and fair use, ultimately these decisions are guided by a certain degree of institutional, organizational, and sometimes even individual risk assessment.

Perspectives on the Future of Commercial Video Use and Media Services in Higher Education

The previous three sections of this chapter addressed copyright and fair use challenges in the context of access and traditional instructional uses of video in higher education. This perspective is focused primarily on video consumption. To be clear, it is critical that media services continue to procure and provide access to instructional video content going forward for these use cases. However, we are now at a point in time where anyone with access to the Internet and a device can act as a self-publisher; and many of us communicate multimodally through images, video, audio, and text on a daily basis with little effort, for example via smartphone messaging apps and social media networks such as Facebook. Therefore, I believe it is appropriate to consider the future of instructional video use, media services, media centers, and copyright/fair use through a media literacy lens that considers both video consumption (“reading”) and potential for creative productive uses (“writing”).

This is not an original idea. Vallier asks the provocative question, “Twenty-first century academic media center: killer app or *chindogu*?” In other words, will media centers be a critical component of the 21st-century research library by evolving to meet the emerging needs of our faculty and students, or are they more akin to a *chindogu*, an invention that is not as useful as it appears (Vallier 2010: 378)? Despite the challenges articulated, I concur with the optimistic tone of Vallier’s response, notably that through experimentation, partnerships, and outreach efforts, academic media centers (and related services) can better position our programs to adapt to users’ emerging needs, thereby making us more like a killer app. As Vallier proposed, this progress will require our programs to further explore development of new service areas such as archiving and curating online content, working with faculty and students to develop new modes of scholarly communication and refining strategies through partnerships for how we acquire, manage, and support use of our [multiformat] collections (Vallier 2010: 383).

Several media services programs, including my own, have already expanded their service model to move in this direction, for example by providing support for user-generated media content (i.e., our program also specializes in supporting student produced video projects, while others additionally support audio production and emerging areas such as 3D printing exemplified by the makerspace movement). I submit that an ideal “killer app” media services program would not only focus on continuing to provide access to valuable instructional video content but would also strive to align services with what we know about instructors’ preferences for use of their own content, online sites such as YouTube, and personal/departamental-purchased collections (Otto 2014: 124), a finding further supported by my own analysis of course syllabi. This suite of services would provide instructors, students, and researchers with the tools and support they need to easily locate, reformat, store, catalog, deliver, and repurpose content through whatever traditional or emerging channel is most appropriate for their teaching, learning, and/or multimodal scholarship needs.

For example, imagine that, in the spirit of the digital arts, sciences, and humanities (DASH) and multimodal scholarship movements, an instructor and students in a class would like to collaboratively work together to create a multimedia online resource illustrating mass media and social media representation of the Black Lives Matter movement, perhaps accompanied by some digital storytelling narrative. A “killer app” media services program could help in a number of ways:

- It could help in coordinating a team of relevant media, subject, digital scholarship librarians (with other library-based and campus support partners) to work with the class in quickly spinning up an online platform that allows for multimedia publishing (e.g., Word Press, Omeka, or Scalar, using a cloud-based service like DASH Domains (DASH n.d.)).
- This team could also work with the class to provide guidance on content curation, description, storage, and delivery of digital media content captured from online media sources (e.g., YouTube, Facebook, Twitter, media outlets), in addition to providing digitization support for clip making from VHS/DVD documentaries (and other physical source material) located in instructor, departmental, and library collections covering the topics of race and media.
- The media librarian (with other library based and campus partners) could then work with the class to help students and the instructor create brief digital story videos providing their own perspectives on the topic. These videos could then be uploaded to the website or simply shared within the class environment.
- Finally, this team could cosponsor with the class a public launch event of the website in the media center, perhaps by inviting speakers to share various perspectives on the topic.

In the preceding example, I believe that multiple fair use provisions of the copyright law would support many of the activities involved in this project, with perhaps some challenge to the storage and republishing of online content depending on whether it was originally legally posted. Indirectly related to copyright, complications could also arise over privacy complaints if there were social media snapshots from, say, a private Facebook account. In addition, there is always the potential of a copyright and/or contract challenge (e.g., resulting in a safe harbor take-down request) coming from one of the online sources or independent film/educational media vendors depending on the contract terms signed by the library.

This project illustrates the kind of innovative potential and some of the institutional risk assessments that our media service programs, teachers, students, and researchers make on a daily basis. I believe that, when weighing the risks and benefits of fair use practice in media service programs or even simply determining whether to apply fair use to a specific project, it is critical that they be considered in balance with the enormous potential for rich innovative pedagogical and scholarship practice. Finally, I believe that these media use practices should be supported by thoughtfully applied fair use rationale on a case-by-case basis, balanced with ensuring the rights of content creators. In doing so, we can continue to advocate for copyright policies that better align with the ever evolving instructional and scholarly needs of our users, while encouraging rights holders to consider sharing their works openly through mechanisms such as Creative Commons licensing or placed in the public domain where they are available for all. (See Code of Best Practices for Online Video for further information on fair use considerations for repurposing video content. (See Spicer (2014) for more information on multimodal scholarship in the context of science scholarly communication.)

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